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# Putting the Cart Back Behind the Horse: The Future of Corporate Liability Under the Alien Tort Statute After *Kiobel*

Nicholas C. Thompson\*

## I. INTRODUCTION

As the world becomes increasingly globalized, and as the global recession that began in 2008 continues to wreak havoc on the economy at large (and the employment market in particular), U.S.-based corporations can ill afford to squander needed financial resources on needless litigation.<sup>1</sup> Although many factors will contribute to a complete economic recovery, a robust U.S. economy depends in part on the success of major U.S.-based corporations and their ability to propel trading activity, employment, and economic growth.

In recent years, plaintiffs have increasingly turned to the Alien Tort Statute<sup>2</sup> (“ATS”) as a means to seek redress in U.S. courts for grievances stemming from actions occurring abroad. As the volume of ATS litigation has grown, so too have the theories of liability and possible range of defendants plaintiffs are pursuing under the statute. One such expansion has been the naming of corporations as defendants in ATS suits, which first occurred in the Second Circuit in 1997.<sup>3</sup> Although defending against litigation is a fact of life for multinational corporations based in the U.S., the ad hoc development of new theories of liability and new causes of action under the ATS has been unwarranted, costly, and has led to a great deal of uncertainty. The purpose of this article is to illustrate the expanded ways in which corporations have been subjected to liability under the ATS in the Second Circuit, which, at least presently, ended with the Second Circuit’s decision in *Kiobel v. Royal Dutch Petroleum Co.*<sup>4</sup>

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1. See Sudeep Reddy, *Grim Milestone as Jobless Rate Tops 10%*, WALL ST. J., Nov. 7, 2009, at A1.

2. 28 U.S.C. § 1350 (2006). The Alien Tort Statute provides as follows: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

3. See *Doe v. Unocal Corp.*, 963 F. Supp 880 (C.D. Cal. 1997).

4. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

In holding that the ATS does not subject corporations to the jurisdiction of U.S. courts,<sup>5</sup> a three judge panel of the Second Circuit has made a move in the right direction in quelling the continued judicial expansion of the ATS. Although the Second Circuit's decision was reached after a thorough analysis of international law, there are significant domestic policy interests at stake as well. For too long, courts have "put the cart before the horse" when it comes to ATS suits, making assumptions about who can be liable and the possible theories under which parties can be liable without considering the legal basis for their assumptions or the consequences of new and expanded forms of liability.<sup>6</sup> ATS precedent encourages courts to consider these interests, and reveals that courts should be wary of expanding the potential bases of ATS liability in the absence of a congressional directive to do so.<sup>7</sup>

Section II of this article will discuss the background and development of the modern line of ATS cases in the Second Circuit which led up to the court's holding in *Kiobel*, and will provide an overview of the statute and the way courts have interpreted it for readers unfamiliar with ATS jurisprudence.<sup>8</sup> Section III will discuss the Second Circuit's opinion in the *Kiobel* case.<sup>9</sup> Section IV of this article will analyze the Second Circuit's *Kiobel* decision in light of the policy reasons that exist for distinguishing between corporations and individuals and will argue that courts should exhibit restraint when deciding future ATS cases in light of the lack of mandate the judiciary has for creating new causes of action.<sup>10</sup>

## II. BACKGROUND

The ATS simply provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, commit-

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5. *Id.* at 145.

6. *See, e.g.,* *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008). In *Romero*, the Eleventh Circuit held that the ATS "grants jurisdiction from complaints of torture against corporate defendants." The court included no analysis of this issue and cited *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005), for the proposition that the ATS grants jurisdiction over corporate defendants. *Aldana*, however, assumed that corporate defendants are subject to jurisdiction under the ATS without analyzing the issue. *Id.* In the Second Circuit, the issue was acknowledged prior to *Kiobel*, but never directly addressed. *See, e.g.,* *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261 (2d Cir. 2009) (assuming, without deciding, that corporations can be liable for violations of customary law, which, in turn, means that corporations can be liable under the ATS).

7. *See* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725-29 (2004).

8. *See infra* Section II.

9. *See infra* Section III.

10. *See infra* Section IV.

ted in violation of the law of nations or a treaty of the United States.”<sup>11</sup> Enacted by the First Congress as part of the Judiciary Act of 1789, the ATS was seldom used by plaintiffs until 1980, the year in which the Second Circuit decided *Filartiga v. Pena-Irala*.<sup>12</sup> In *Filartiga*, the plaintiffs, Paraguayan citizens living in the U.S., brought a wrongful death action under the ATS against the defendant, a former Paraguayan Inspector General of Police, who was also then living in the U.S.<sup>13</sup> The plaintiffs were the father and sister of a man killed in Paraguay while in the custody of the defendant.<sup>14</sup> The plaintiffs alleged that the decedent was killed in response to the political activities of one of the plaintiffs, the decedent’s father.<sup>15</sup> The Second Circuit held that “an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence, the law of nations.”<sup>16</sup> Thus, the court had jurisdiction over the case pursuant to the ATS.<sup>17</sup> Despite the deceptively simple language of the ATS, *Filartiga* was merely the beginning of a long line of cases in the Second Circuit exploring the scope and contours of the ATS.<sup>18</sup>

After the *Filartiga* decision, U.S. federal courts presiding over lawsuits predicated on this vague and largely unexplored statute examined the issue of whether the ATS was intended solely to confer jurisdiction to federal courts for tort claims brought by aliens, or whether the statute also created a cause of action for various torts committed “in violation of the law of nations.”<sup>19</sup> This issue was of critical importance: if the ATS is solely jurisdictional, legislation would be required to create a cause of action under the ATS, making the statute of little utility absent the congressional creation of actionable offenses. In its only decision involving the ATS, the U.S. Supreme

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11. 28 U.S.C. § 1350 (2006).

12. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

13. *Id.* at 878.

14. *Id.*

15. *Id.* at 879.

16. *Id.* at 880.

17. *Filartiga*, 630 F.2d at 889.

18. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Khulumani v. Barclay Nat’l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Viet. Assoc. Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

19. 28 U.S.C. § 1350 (2006). The issue was first addressed in 1984 in a concurring opinion written by Judge Bork of the Court of Appeals for the D.C. Circuit. He argued that the ATS merely confers jurisdiction and that a cause or causes of action would need to be created legislatively. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801-08 (D.C. Cir. 1984).

Court took the opportunity to clarify the matter for lower federal courts going forward in *Sosa v. Alvarez-Machain*.<sup>20</sup>

#### A. *Sosa v. Alvarez-Machain*

The Supreme Court's decision in *Sosa v. Alvarez-Machain* finally settled the question of whether the ATS creates a cause of action or whether it is simply a jurisdictional statute which provides jurisdiction in U.S. federal courts.<sup>21</sup> In *Sosa*, the plaintiff, a Mexican citizen, was indicted by a U.S. federal grand jury for the torture and murder of a Drug Enforcement Agency ("DEA") agent.<sup>22</sup> The plaintiff alleged that he was kidnapped in Mexico and transported to the U.S. at the behest of DEA agents in order to stand for trial.<sup>23</sup> Following an acquittal in his criminal trial, the plaintiff filed a tort suit in a U.S. district court against a Mexican national who participated in the kidnapping, claiming that the abduction constituted a violation of the law of nations under the ATS.<sup>24</sup>

Upon review, the Supreme Court held that the ATS is a jurisdictional statute, but that the "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time" the statute was enacted.<sup>25</sup> The Court stated that, historically, those actions were (1) offenses against ambassadors, (2) violations against safe conduct, and (3) "individual actions arising out of prize captures and piracy."<sup>26</sup> Pursuant to the *Sosa* decision, federal courts are allowed to recognize additional causes of action but "should not recognize private claims under federal common law for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."<sup>27</sup> In essence, this means that a court may not exercise jurisdiction over a claim unless the tort is as well-defined as the torts that constituted violations of the law of nations in 1789. After consulting various

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20. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

21. *Id.* at 694.

22. *Id.* at 697.

23. *Id.* at 698.

24. *Id.* The plaintiff also sued the United States government under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1). The Supreme Court held that the Federal Tort Claims Act's "foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Sosa*, 542 U.S. at 712.

25. *Id.* at 724.

26. *Id.* at 720.

27. *Id.* at 732.

sources of international law, the court concluded that the plaintiff's claim of arbitrary detainment failed due to the fact that there was no sufficiently specific binding rule of international law prohibiting this conduct.<sup>28</sup> Significantly, the Court commanded lower federal courts to exercise judgment as to the practical consequences of making a cause of action available to litigants in U.S. federal courts.<sup>29</sup> Thus, even if a tort claim is as well-defined and definite as the torts considered to be violations of the law of nations in 1789, courts should not exercise jurisdiction if the practical consequences of doing so would be too great.

The Supreme Court put forth a number of reasons why courts should exercise restraint in allowing new causes of action to proceed under the ATS.<sup>30</sup> The Court discussed the change in conception of the federal common law<sup>31</sup> and the Court's decision in *Erie R.R. Co. v. Tompkins*,<sup>32</sup> which ended the notion of a body of federal common law and instructed courts to look to legislative guidance rather than exercising judgment over innovations in the law.<sup>33</sup> In addition, the Court indicated that consideration should be given to the potential implications for U.S. foreign relations and foreign policy before extending the ATS to encompass new causes of action.<sup>34</sup> Finally, the Court acknowledged that it had "no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity."<sup>35</sup>

Justice Scalia concurred, writing for himself, Justice Thomas, and Chief Justice Rehnquist. He agreed with the majority that the ATS is a jurisdictional grant, but disagreed with the majority's position that courts have the discretion to create causes of action under the ATS based on international law.<sup>36</sup> According to Justice Scalia, "creating a

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28. *Id.* at 738.

29. *Sosa*, 542 U.S. at 733.

30. *Id.* at 725-31.

31. *Id.* at 725. The Court stated when the ATS was enacted, "the accepted conception was of the common law as 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'" *Id.* (quoting *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928)). The Court went on to state that "[n]ow, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created." *Id.*

32. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

33. *Sosa*, 542 U.S. at 726.

34. *Id.* at 727-28.

35. *Id.* at 728.

36. *Id.* at 739.

federal command (federal common law) out of 'international norms,' and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts."<sup>37</sup>

Since the Supreme Court's decision in *Sosa*, however, federal courts have found that the ATS provides a cause of action in increasingly divergent circumstances.<sup>38</sup>

#### B. Abdullahi v. Pfizer, Inc.

*Abdullahi v. Pfizer, Inc.* provides a useful illustration of the type of analysis that is undertaken by courts faced with the question of whether a particular claim constitutes a proper cause of action under the ATS after the Supreme Court's *Sosa*<sup>39</sup> decision. In *Abdullahi*, the plaintiffs, who were Nigerian children and their guardians, alleged that after an outbreak of bacterial meningitis in northern Nigeria, the defendant, pharmaceutical manufacturer Pfizer, sent three American doctors to work with a group of four Nigerian doctors to experiment with the use of a new drug, Trovan.<sup>40</sup> At the time, Trovan had not yet been approved by the FDA.<sup>41</sup> The drug was given to children who were patients at a hospital in Kano, Nigeria.<sup>42</sup> The doctors, who were employees of Pfizer, allegedly treated two hundred children who sought treatment at the hospital.<sup>43</sup> The plaintiffs alleged that half the children were given Trovan, and the other half were given a drug called Ceftriaxone, which had already been approved by the FDA.<sup>44</sup> The plaintiffs alleged that the doctors purposely gave the children who took Ceftriaxone a lower dose than necessary in order to make Trovan look more effective in treating meningitis.<sup>45</sup>

After two weeks, Pfizer allegedly left Nigeria without administering further care.<sup>46</sup> Eleven children died; five had taken Trovan and six took the allegedly lowered dose of Ceftriaxone.<sup>47</sup> The plaintiffs alleged that Pfizer did not obtain the informed consent of the children or their parents and did not disclose the risks associated with the ex-

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37. *Id.* at 743.

38. See, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *In re S. African Apartheid*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

39. 542 U.S. 692 (2004).

40. *Abdullahi*, 562 F.3d at 169.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Abdullahi*, 562 F.3d at 169.

46. *Id.*

47. *Id.*

perimental study, both of which were required under treatment protocol prior to treatment.<sup>48</sup>

In reviewing the district court's dismissal of the case for failure to state a claim under the ATS, the Second Circuit used a test previously developed in that circuit to determine whether the allegations in the plaintiffs' complaint, if true, established a violation of international law which is actionable under the ATS.<sup>49</sup> Under that test, the court "determine[d] whether the norm alleged (1) [was] a norm of international character that States universally abide by, or accede to, out of a sense of legal obligation, (2) [was] defined with a specificity comparable to the 18th-century paradigms discussed in *Sosa*, and (3) [was] of mutual concern to States."<sup>50</sup> The first step the court took in making that determination was to look at Article 38 of the Statute of the International Court of Justice, which identified where to find "competent proof of the content of customary international law."<sup>51</sup>

The court looked to a number of sources of international law in coming to the conclusion that the norm of international law prohibiting non-consensual medical experimentation was "universally accept[ed] in the community of nations."<sup>52</sup> The court rested its decision that there was broad acceptance of this norm of international law on the quantity of sources and "a consistent pattern of action by national law-making authorities."<sup>53</sup> The court then addressed the issue of whether the norm of international law prohibiting non-consensual medical experimentation contained the degree of specificity required by *Sosa*, and quickly concluded that the required specificity was pre-

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48. *Id.* at 170.

49. *Id.* at 174.

50. *Abdullahi*, 562 F.3d at 175.

51. *Id.* The U.S. is a party to the International Court of Justice Statute. These sources of international law under the statute are:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38(1) (1945).

52. *Abdullahi*, 562 F.3d at 183-84. Among those sources were the London Agreement to the International Military Tribunal, the International Convention on Civil and Political Rights ("ICCPR"), the World Medical Association's Declaration of Helsinki, and U.S. domestic law. *Id.* at 177-84.

53. *Id.* at 184.



sent due to the volume of recognized sources of international law that created the norm.<sup>54</sup>

The dissenting opinion of Judge Wesley highlights the murky waters that courts often tread in when trying to determine whether an ATS cause of action should be permitted to proceed under *Sosa*.<sup>55</sup> Although Judge Wesley agreed with the test the majority used for determining whether a cause of action may proceed under the ATS, he disagreed that the first and third parts of the majority's test were satisfied.<sup>56</sup> In concluding that the prohibition of non-consensual medical experimentation is not universally abided by and that states are not obligated to abide by it, the dissent examined the sources of international law relied upon by the majority.<sup>57</sup> In response to the majority's reliance on the enactment of the International Convention on Civil and Political Rights ("ICCPR"), the dissent quoted the Supreme Court's *Sosa* opinion, which stated that the ICCPR is a "well-known international agreement that despite its moral authority, has little utility in defining international obligations."<sup>58</sup> The dissenting opinion also noted that the ICCPR does not apply to private actors.<sup>59</sup> The dissent noted that (1) the Convention on Human Rights and Biomedicine relied on by the majority in its analysis was a regional convention, (2) the largest and most influential nations in the region did not ratify the Convention, and (3) the actions at issue in *Abdullahi* took place a year *before* the Convention was promulgated.<sup>60</sup> A number of the sources of international law were promulgated after the events at issue in the case, and those sources specifically stated that they were "not significant or relevant for purposes of customary international law," and that they "express[ed] the sensibilities and the asserted aspirations and demands of some countries or organizations but are not statements of universally-recognized legal obligations."<sup>61</sup>

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54. *Id.* *Sosa* requires courts to only recognize causes of action where the norm of international law is "no less definite in content . . . than the historical paradigms familiar when the ATS was enacted." 542 U.S. at 732 (2004).

55. 542 U.S. 692 (2004).

56. *Abdullahi*, 562 F.3d at 191-212 (Wesley, J., dissenting). The first part of the test requires that it is a norm of international character that States universally abide by, or accede to, out of a sense of legal obligation. The third part requires that the norm is of mutual concern to States. *Id.*

57. *Id.* at 193-207.

58. *Id.* at 195 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004)).

59. *Id.*

60. *Abdullahi*, 562 F.3d at 195 (emphasis added).

61. *Id.* at 196-97 (Wesley, J., dissenting). See Convention on Human Rights and Biomedicine, Apr. 4, 1997, E.T.S. No. 164.

An important point of disagreement for the dissent was that the majority only considered the underlying norm – the prohibition of non-consensual medical testing – but did not consider the violator of the norm.<sup>62</sup> The dissent argued that the consideration should be “whether customary international law prohibits *private actors* from medical experimentation on non-consenting human subjects.”<sup>63</sup> According to the dissent, it may well be that a norm of international law meets the test with respect to state actors, but does not have the same universal application with respect to private actors.<sup>64</sup>

As for the majority’s conclusion that non-consensual medical experimentation by private actors was an issue of mutual concern for the states, the dissent argued that “in order for conduct to be of mutual concern, it must ‘threaten serious consequences in international affairs.’”<sup>65</sup> According to the dissent, the risks from medical experimentation by private actors simply do not rise to the level required by *Sosa*, because the potential consequences are not great enough.<sup>66</sup> The dissent pointed out that “murder of one private party by another, universally proscribed by the domestic law of all countries . . . is not actionable” under the ATS, “because the nations of the world have not demonstrated that this wrong is of mutual, and not merely several, concern.”<sup>67</sup> As that is so, the dissent questioned how non-consensual medical experimentation by one private party on another is a matter of mutual concern.<sup>68</sup> Noting that the Second Circuit has consistently looked at whether a state has agreed to be bound by means of an express international agreement as the best evidence as to whether a norm is one of mutual concern, the dissent strongly disagreed with the majority’s view that treaties applicable to state action apply equally to private action without some expression in the agreements themselves stating that that is the case.<sup>69</sup>

Finally, the dissent argued that the downstream effects (in reference to the majority’s view that Pfizer’s actions could encourage the spread of disease because potential foreign plaintiffs might be leery of medical treatment from American corporations and thus go untreated) of non-consensual medical experimentation do not convert the plaintiffs’

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62. *Abdullahi*, 562 F.3d at 193.

63. *Id.* at 194 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004) (emphasis in original)).

64. *Id.* at 203. This view is grounded in *Sosa* footnote 20.

65. *Id.* at 185 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004)).

66. *Id.* at 196-97 (Wesley, J., dissenting).

67. *Abdullahi*, 562 F.3d at 207.

68. *Id.*

69. *Id.* at 208.

claims into violations of the law of nations.<sup>70</sup> To illustrate this, the dissent pointed out that under the majority's view, "[the analysis] would be no different when evaluating the medical malpractice of Pfizer's research physicians or the strict products liability for its allegedly defective drug, but malpractice and products liability are among the quintessential subjects of domestic law."<sup>71</sup>

### C. Presbyterian Church of Sudan v. Talisman Energy, Inc.

Aside from finding jurisdiction under the ATS for an increasing variety of claims, as illustrated by *Abdullahi*, federal courts have also expanded upon the theories of liability available under a given cause of action.<sup>72</sup> A prominent example of this is the Second Circuit's decision, announced in *Khulumani v. Barclay National Bank, Ltd.*, to allow plaintiffs to plead claims of aiding and abetting liability against defendants.<sup>73</sup> In this type of case, a plaintiff may plead that a defendant (such as a corporation) aided and abetted the actual violator of customary international law. After holding that a defendant may be liable for aiding and abetting in *Khulumani*,<sup>74</sup> the Second Circuit addressed the proper standard for aiding and abetting liability in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*<sup>75</sup>

In *Presbyterian Church*, heard on the same day and by the same Second Circuit panel as *Kiobel*,<sup>76</sup> a unanimous panel enunciated the aiding and abetting liability standard as well as the source of law that dictates that standard.<sup>77</sup> The case arose out of human rights abuses alleged to have been committed by the Sudanese government against the civilian population in southern Sudan.<sup>78</sup> Specifically, the plaintiffs alleged that the defendant, a Canadian corporation engaged in oil extraction in southern Sudan, aided and abetted the government in violating customary international law related to torture, war crimes, genocide, and crimes against humanity.<sup>79</sup> The Second Circuit affirmed the district court's grant of summary judgment for the defendant, holding that under the ATS, a court must look to international law to determine the proper standard for aiding and abetting liability,

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70. *Id.*

71. *Id.* at 208 (Wesley, J., dissenting).

72. *See, e.g., In re Chiquita Brands Int'l, Inc.*, 536 F. Supp. 2d 1371 (J.P.M.L. 2008).

73. *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007).

74. *Id.*

75. 582 F.3d 244 (2d Cir. 2009).

76. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

77. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

78. *Id.* at 250-51.

79. *Id.* at 251.

and that under international law, a plaintiff must “show that the defendant provided substantial assistance with the *purpose* of facilitating the alleged offenses.”<sup>80</sup> The court concluded that the plaintiffs could not prove that the defendant acted with the “purpose to assist the Government’s violations . . . .”<sup>81</sup>

The court relied heavily on Judge Katzmman’s concurrence in *Khulumani*,<sup>82</sup> and looked to footnote 20 of *Sosa* to support the proposition that the scope of liability for a violation of international law under the ATS should be found in international law.<sup>83</sup> The court also noted that looking to domestic law for the aiding and abetting liability standard would “violate *Sosa*’s command that we limit liability to ‘violations of . . . international law . . . with . . . definite content and acceptance among civilized nations equivalent to the historical paradigms familiar when [the ATS] was enacted.’”<sup>84</sup> The court then looked to the Rome Statute of the International Court of Justice and adopted its standard as the proper standard for aiding and abetting liability.<sup>85</sup> Under this standard, aiding and abetting liability exists “when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the *purpose* of facilitating the commission of that crime.”<sup>86</sup>

### III. SUBJECT OPINION: *KIOBEL V. ROYAL DUTCH PETROLEUM CO.*

In *Kiobel*, a three judge panel of the Second Circuit Court of Appeals examined a question, the answer to which had previously been assumed but not decided in the Second Circuit: whether corporations are subject to the jurisdiction provided to federal courts by the ATS.<sup>87</sup> Two judges agreed that corporations are not subject to the jurisdiction provided by the ATS, while one judge ultimately concurred in the judgment but strenuously disagreed with the majority’s analysis.<sup>88</sup> This section discusses the facts surrounding the case and the Second Circuit’s decision.

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80. *Id.* at 247 (emphasis added).

81. *Id.* at 263.

82. *Khulumani v. Barclay Nat’l Bank, Ltd.*, 504 F.3d 254, 268-77 (2d Cir. 2007) (Katzmann, J., concurring).

83. *Id.* at 258.

84. *Presbyterian Church*, 582 F.3d at 259 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

85. *Id.*

86. *Id.* (emphasis added).

87. *Id.* at 117.

88. *Id.* at 114.

### A. *Factual History*

The facts of *Kiobel* are relatively straightforward. Beginning in 1958, the defendants, Royal Dutch Petroleum Company (“Royal Dutch”) and Shell Transport and Trading Company PLC (“Shell”) operated a subsidiary, Shell Petroleum Development Company of Nigeria, Ltd (“SPDC”), in the Ogoni Region of Nigeria.<sup>89</sup> SPDC was engaged in oil production and exploration.<sup>90</sup> A group of people in the Ogoni Region formed a group called “Movement for Survival of Ogoni People,” which protested, among other things, the effects of oil exploration on the environment of the region.<sup>91</sup> The plaintiffs, who were residents of the Ogoni region, alleged that in 1993, the defendants responded to the protestors by enlisting the Nigerian government to combat the resistance of the Ogoni people.<sup>92</sup> The Nigerian government is alleged to have “shot and killed Ogoni residents and attacked Ogoni villages – beating, raping, and arresting residents and destroying or looting property . . . with the assistance of [the] defendants.”<sup>93</sup> The plaintiffs alleged that the defendants “(1) provided transportation to Nigerian forces, (2) allowed their property to be utilized as a staging ground for attacks, (3) provided food for soldiers involved in the attacks, and (4) provided compensation to those soldiers,” and that by aiding and abetting the Nigerian government in this way, the defendants violated the law of nations under the ATS.<sup>94</sup> The plaintiffs’ specific claims were that the defendants aided and abetted “(1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.”<sup>95</sup>

### B. *Procedural History*

The plaintiffs filed a complaint in the District Court for the Southern District of New York in 2002 and amended their complaint in

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89. *Presbyterian Church*, 582 F.3d at 123.

90. *Id.*

91. *Kiobel*, 621 F.3d at 123. In 1990, the Movement for Survival of Ogoni People presented the Nigerian government with the Ogoni Bill of Rights, which called for political autonomy, the right to control Ogoni affairs, the right to control and use Ogoni resources, adequate representation in political institutions, and the right to protect the Ogoni environment from degradation. See *Ogoni Bill of Rights* (1990), available at [http://www.mosop.org/Ogoni\\_Bill\\_of\\_Rights\\_1990.pdf](http://www.mosop.org/Ogoni_Bill_of_Rights_1990.pdf).

92. *Kiobel*, 621 F.3d at 123.

93. *Id.*

94. *Id.*

95. *Id.*

2004.<sup>96</sup> Holding that customary international law did not define the plaintiffs' claims with the level of particularity required by *Sosa*, the district court entered an order dismissing all of the plaintiffs' claims except the claims for "aiding and abetting arbitrary arrest and detention; crimes against humanity; and torture or cruel, inhuman, and degrading treatment."<sup>97</sup> The district court then certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).<sup>98</sup>

### C. *The Second Circuit's Opinion in Kiobel*

The Second Circuit panel affirmed the portion of the district court's order dismissing the claims against the defendants and reversed the order to the extent that it allowed the plaintiffs' claims to proceed.<sup>99</sup> Noting that the Second Circuit had "never directly addressed whether [its] jurisdiction under the ATS extends to civil actions against corporations," the court framed the issue as involving a two step analysis.<sup>100</sup> The first step required the court to determine whether international law or domestic law governs the question.<sup>101</sup> In finding that international law governs, the court looked to various sources of international law and concluded that "the subjects of international law are determined by international law."<sup>102</sup> The court then looked to *Sosa* and Circuit precedent to determine "whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."<sup>103</sup> The question of whether the scope of liability extends to the party being sued is significant because previous

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96. *Id.* at 124.

97. *Kiobel*, 621 F.3d at 124.

98. *Id.* 28 U.S.C. § 1292(b) (2006) provides as follows:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

99. *Kiobel*, 621 F.3d at 149.

100. *Id.* at 124.

101. *Id.*

102. *Id.* at 126. Among the sources of international law relied upon were the International Military Tribunal at Nuremberg, Restatement (Third) of the Foreign Relations Law of the United States, and Oppenheim's International Law.

103. *Id.* at 127 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004)) (emphasis added).

cases in the Second Circuit reached different results based on whether an alleged perpetrator was a state official or private actor.<sup>104</sup> Ultimately, the court found that under *Sosa*, it must look to customary international law to “determine *both* whether certain conduct leads to ATS liability *and* whether the scope of liability under the ATS extends to the defendant being sued.”<sup>105</sup> Noting that it had looked to international law to determine whether state officials,<sup>106</sup> private individuals,<sup>107</sup> and aiders and abettors<sup>108</sup> can be liable under the ATS, the court concluded that it must also look to international law to determine whether corporations can be liable for international law violations under the ATS.<sup>109</sup>

The second step of the Second Circuit’s analysis required the court to determine whether corporate liability is a norm of customary international law.<sup>110</sup> The court cited *Sosa* for the proposition that a norm must be “specific, universal, and obligatory” to “attain the status of a rule of customary international law.”<sup>111</sup> After indicating the sources of international law *Sosa* requires courts to review,<sup>112</sup> the court analyzed each source and concluded that “imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among the nations of the world in their relations *inter se*.”<sup>113</sup>

In presenting its holding, and in response to the concurring opinion, the majority was careful to point out what it had *not* decided, noting that “[n]othing in this opinion limits or forecloses suits under the ATS

104. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (2d Cir. 1995) (holding that private actors can be liable for genocide, war crimes, and crimes against humanity, whereas state actors can be liable for a broader range of offenses).

105. *Kiobel*, 621 F.3d at 128 (emphasis added).

106. *Id.* at 130 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980)).

107. *Id.* (citing *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (2d Cir. 1980)).

108. *Id.* (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258-59 (2d Cir. 2009)).

109. *Id.*

110. *Kiobel*, 621 F.3d at 131.

111. *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

112. *Id.* See *Sosa*, 542 U.S. 692, 733-34 (2004), which states:

Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning with the law ought to be, but for trustworthy evidence of what the law really is.

(citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

113. *Kiobel*, 621 F.3d at 132-45. Pursuant to Circuit precedent, the court relied upon international tribunals, international treaties, and works of “publicists” (meaning scholars and jurists).

against a corporation's employees, managers, officers, directors, or any other person who commits, or purposefully aids and abets, violations of international law."<sup>114</sup> The opinion also emphasized the fact that the holding applies only to corporate liability under the ATS; it has nothing to do with corporate liability under other bodies of law, including U.S. domestic law.<sup>115</sup>

#### D. Judge Leval's Concurrence

Although Judge Leval ultimately concurred in the judgment, the concurring opinion evinces a fundamental disagreement with the majority as to whether corporations are subject to the jurisdiction of U.S. federal courts under the ATS.<sup>116</sup> Despite agreement that "international law does not of its own force impose liability on corporations,"<sup>117</sup> under the rationale of the concurrence, this is, for all practical purposes, irrelevant.<sup>118</sup> The concurring opinion focused on the absence of precedent for the rule adopted by the majority, stating that "[n]o authoritative source document of international law adopts or in any way approves the majority's view" that corporations are not subject to federal court jurisdiction under the ATS.<sup>119</sup> Under the view of the concurrence, lack of support for corporate liability in international law is not important, because the proper source material is domestic, rather than international, law.<sup>120</sup> This is the case because Judge Leval views the question of whether corporations can be liable merely as an issue of remedy.<sup>121</sup>

#### IV. ANALYSIS

In *Kiobel*, the Second Circuit correctly held that, because international law is the proper source for determining the scope of liability for violations of international law norms and corporate liability is not a norm of international law, corporations are not subject to the jurisdiction of U.S. courts under the ATS.<sup>122</sup> However, in light of the continuing ability of courts to hold *individuals* liable under the ATS, there

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114. *Id.* at 149.

115. *Id.*

116. *Id.* at 149-96 (Leval, J., concurring).

117. *Id.* at 186.

118. *Kiobel*, 621 F.3d at 174 (Leval, J., concurring).

119. *Id.* at 160.

120. *Id.* at 175.

121. *Id.* at 176 ("International law leaves the manner of remedy to the independent determination of each State.").

122. *Id.* at 145. Of course, the decision does not affect suits brought against corporations under other statutes.



are policy reasons, largely unacknowledged by the court, that lend support for distinguishing between corporations and individuals. Courts outside the Second Circuit will inevitably be called upon to determine whether corporations are subject to the jurisdiction of U.S. courts under the ATS in light of the *Kiobel* holding. In addressing this issue, courts should be mindful of the Supreme Court's admonishment in *Sosa* that "judicial caution" must be exercised,<sup>123</sup> and consider the features that distinguish individual liability from corporate liability.

Providing jurisdiction in U.S. courts for ATS suits against corporations has a negative impact not only on corporations and their shareholders, but also on American taxpayers and international trade. In addition, providing jurisdiction under the ATS for suits against corporations clogs federal dockets by inviting lawsuits with questionable legal merit: as the permissible bases for litigation expand, plaintiffs will become less constrained by the pleading requirements of Rule 11(b)(2) of the Federal Rules of Civil Procedure.<sup>124</sup> Finally, the failure to exercise judicial restraint under the ATS poses problems for U.S. foreign relations. Rather than focusing on the possible ramifications of *not* expanding the reach of the ATS in a given case, courts must follow the command of the Supreme Court and view the consequences of expanding the scope of liability under the ATS as a *limitation* upon further expansion.

#### A. *Sosa's "Practical Consequences"*

In deciding *Kiobel*,<sup>125</sup> the Second Circuit mentioned *Sosa's* directive that courts must give weight to the "practical consequences of making [an ATS] cause [of action] available to litigants in the federal courts," but the Second Circuit did little more than mention this requirement.<sup>126</sup> Under the court's analysis, the question of whether corporations are subject to jurisdiction under the ATS carries equal weight as the question of whether to recognize a new cause of action under the

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123. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

124. Rule 11(b)(2) of the Federal Rules of Civil Procedure provides as follows:

Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

...

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.

FED. R. CIV. P. 11(b) (emphasis added).

125. *Kiobel*, 621 F.3d 111 (2d Cir. 2010).

126. *Id.* at 125 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 722-23 (2004)).

ATS.<sup>127</sup> The Supreme Court's admonishment in *Sosa* that courts consider the "practical consequences" of making a cause of action available has been interpreted by lower courts to mean that courts should consider the practical consequences that the decision will have on courts and on U.S. foreign policy.<sup>128</sup> Be that as it may, subjecting corporations to the jurisdiction of U.S. courts under the ATS has many far-ranging consequences outside of the courthouse doors. Under *Sosa*, courts have the implicit, if not explicit, authority to use discretion when faced with the question of whether to further expand the reach of the ATS.

Despite the fact that lower courts have interpreted the "practical consequences" language to refer to the practical consequences that the decision to allow a cause of action will have on courts, some courts have seemingly looked at the alleged conduct of the defendant and then determined whether the practical consequences of *not* allowing the cause of action to proceed favor permitting the action.<sup>129</sup> Of course, one could argue that the potential benefits of allowing an ATS action to proceed are in fact a consequence and that it is proper to consider these benefits under *Sosa*. But it is clear from the language of *Sosa* that the "practical consequences" consideration is a limitation on allowing new causes of action.<sup>130</sup>

One practical consequence of allowing new causes of actions or theories of liability under the ATS can occur when courts focus on the specific allegations in the case rather than the norm of international law that is implicated. Once a court reviews a source of international law to determine if specific conduct violates the law of nations for

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127. *Id.* at 128 (quoting *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009)). "[R]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place."

128. *See, e.g., Arar v. Ashcroft*, 532 F.3d 157, 182-83 (2d Cir. 2008) (discussing the impact allowing the litigation to proceed would have on U.S. diplomatic and national security interests); *De Los Santos Mora v. N.Y.*, 524 F.3d 183, 209 (2d Cir. 2008) (noting the impracticalities of making the failure to notify a criminal defendant of his right to contact his country's consul a violation of the law of nations); *Taveras v. Taveraz*, 477 F.3d 767, 782 (6th Cir. 2007) (noting that allowing a claim of parental child abduction to be considered a cause of action under the ATS would turn federal courts into "ill-suited family courts").

129. *See, e.g., Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 186 (2d Cir. 2009) (stating that the administration of drug trials without informed consent poses a threat to international peace and security and that the "failure to secure consent for human experimentation has the potential to generate substantial anti-American animus and hostility.").

130. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). Footnote 21 follows the "practical consequences" directive. Footnote 21 begins by stating: "This requirement of clear definition is not meant to be the only principle *limiting* the availability of relief in the federal courts for violations of customary international law . . ." (emphasis added). The second paragraph of Footnote 21 states: "*Another possible limitation* that we need not apply here is a policy of case-specific deference to the political branches . . ." (emphasis added).

ATS purposes, the specific factual allegations in the case lose their long-term importance. If a future defendant's conduct is entirely less serious but the same or an equivalent source of law is implicated, the future defendant may pay the price for a previous court's zeal to punish a previous wrongdoer's reprehensible conduct. Thus, in undertaking an examination of the practical consequences of making an action available, it is important that courts focus on the specificity of the norm of international law rather than the reprehensibility of the defendant's conduct.

### B. *Ending Corporate Liability Does Not End All Liability*

At first blush, the holding in *Kiobel* may seem disturbing in that it could allow corporations to directly violate human rights around the globe without fear of liability under the ATS. Indeed, the concurring opinion in *Kiobel* discusses this possibility at length.<sup>131</sup> But, as the majority noted, "[c]orporate liability imposes responsibility for the actions of a *culpable individual* on a wholly new defendant – the corporation."<sup>132</sup> While *corporations* cannot be liable under *Kiobel*, the individuals working for a corporation, whether directors, officers, or employees, will continue to be held liable.<sup>133</sup> The possibility of personal liability for violations of international law under the ATS provides a strong incentive for corporate decision-makers and employees to conform their conduct to that which is permitted by international law. A corporate executive will likely be exposed to much greater financial risk in the face of personal liability than the executive would face as a result of corporate losses stemming from ATS litigation. At the same time, a regime of corporate liability puts the risk of loss on corporate shareholders who typically have very little knowledge, and thus little culpability, for the actions of persons acting on behalf of the corporation.

### C. *The Impact of Corporate Liability Under the ATS*

In determining whether corporations should be subject to jurisdiction under the ATS, courts should take notice of the grounds that exist for distinguishing between individuals and corporations, and be mindful of the implications the decision will have on domestic corporations, their shareholders, the U.S. economy, and the developing world. This does not mean that plaintiffs should be left without the remedy the

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131. See *Kiobel*, 621 F.3d at 155-57 (Leval, J., concurring).

132. *Id.* at 146 (emphasis added).

133. See *id.* at 149.

ATS provides if an actionable tort under the ATS is committed. Instead, plaintiffs should look to *individuals* – those immediately responsible for such acts – rather than to corporations, where the cost will often be spread to those with no knowledge of or responsibility for corporations' actions.

### 1. Litigation Expense

One implication of permitting corporate liability under the ATS is the costs involved with ATS suits. Of course, a necessary component of operating a large multinational corporation is the necessity of expending resources on litigation. Unlike many other corporate expenditures, defensive litigation, used here to mean litigation where the corporation is forced to expend resources defending a suit, does not typically add value to the corporation. Theoretically, every dollar spent defending a suit is a dollar not included in a corporation's annual profits. One recent study found that, in 2006, total combined profits for all Fortune 500 companies equaled \$610 billion.<sup>134</sup> Those same companies spent a total of \$210 billion on litigation expenses.<sup>135</sup> In that same year, compensation for Fortune 500 CEOs was a combined total of \$7.5 billion.<sup>136</sup> This means that corporations expended more than one third of the dollar amount of total profits and twenty-eight times more than CEO compensation on litigation expenses.<sup>137</sup> Although it is difficult, if not impossible, to know exactly how much of each corporation's litigation budget was expended on ATS litigation, plaintiffs in ATS cases typically claim and have been awarded substantial damages.<sup>138</sup> In addition, the uncertainty surrounding issues such as the development of new causes of action and theories of liability, such as aiding and abetting liability, will inevitably result in breeding more litigation to test the parameters of the ATS in district courts across the country.

The cost of litigation, and the costs of settlements or judgments that result from ATS suits, are ultimately borne by the shareholders of cor-

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134. John B. Henry, *Fortune 500: The Total Cost Of Litigation Estimated at 1/3 Profits*, available at <http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=September&artYear=2009&EntryNo=7862> (last visited Jan. 20, 2010).

135. *Id.*

136. *Id.*

137. *Id.*

138. See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163,169 (2d Cir. 2009); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) (Plaintiffs alleged damages totaling more than \$400 billion). See Isabel Ordonez & Russell Gold, *Shell Settles Nigeria Case — Oil Giant to Pay \$15.5 Million Over Deaths of Activists*, WALL ST. J., June 9, 2009, at B2 (discussing an ATS claim settled by corporate defendants for \$15.5 million despite the corporation's refusal to admit liability).

porations. Of course, corporations are generally subject to civil liability under U.S. law, and this is not, nor should it be, controversial. The difference in ATS cases is the Supreme Court's directive that lower courts approach the expansion of the ATS with caution, and the fact that courts have "no congressional mandate to seek out and define new and debatable violations of the law of nations."<sup>139</sup> Where no other possibility of recovering damages exists, the combination of deep corporate pockets and the ability to bring suit in U.S. courts surely makes corporations attractive defendants, and can result in corporate shareholders absorbing the costs of wrongs that were perpetrated by foreign states. A regime of ATS corporate liability allows the costs of redressing the wrongs of foreign governments to be shifted too easily to the shareholders of U.S. corporations.

## 2. Loss of Productivity

The combination of substantial litigation costs and significant uncertainty for U.S. corporations considering investment or operations outside the U.S. will lead to reduced productivity by those corporations. Any time a corporation considers whether to expand operations to a location outside the U.S., it must undertake an examination of the risks involved in doing so. The possibility of being subject to jurisdiction, combined with the expansion of causes of action<sup>140</sup> and theories of liability<sup>141</sup> under the ATS, will force corporations to undergo an analysis of the ATS litigation risk that could come from that investment.<sup>142</sup> Although the law of the Second Circuit after *Presbyterian Church* requires plaintiffs to show that a defendant acted with the purpose of aiding and abetting a violation of the law of nations,<sup>143</sup> there is no clear national standard at this point in time. While it is a good thing for corporations to evaluate their actions and to act responsibly and ethically, the ad hoc development of new causes of action and theories of liability make it impossible to determine exactly what will be considered a violation of the law of nations. It seems impossible for corporations to know that a state is violating the law of nations if the law of nations remains undefined, amorphous, and subject to further judicial expansion. The uncertainty of whether an investment will lead to substantial future ATS liability may force a corporation to decide to either: (a) refrain from entering the transac-

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139. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

140. See, e.g., *Abdullahi*, 562 F.3d at 169.

141. See, e.g., *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007).

142. 28 U.S.C. § 1350 (2006).

143. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247 (2d Cir. 2009).

tion out of concern that a party to the transaction has previously or is currently violating the law of nations based on existing case law, or (b) conclude that, given the uncertainty attendant to ATS litigation, it is too risky to enter the transaction because it is foreseeable that the ATS may be interpreted in the future to apply to some conduct in question. This outcome is certainly negative in terms of promoting economic efficiency, because a corporation may decline to invest in a location it otherwise would have out of fear that it could face costly and embarrassing litigation.<sup>144</sup>

### 3. Unintended Economic Consequences in the Third World

On the surface, subjecting corporations to the jurisdiction of U.S. courts looks like a positive step for human rights. But it is not necessarily the case that isolating states with poor human rights records from foreign investment will be a positive step for human rights on the whole. A regime of corporate ATS liability discourages corporations from operating in locales where corporate activity could have the most substantial positive impact. Many of the world's infamous human rights abusing states are economically isolated from the global economy.<sup>145</sup> Organizations such as the International Monetary Fund and World Bank promote economic development in the poorest countries (which often have poor human rights records), in order to help these nations enter the global economy.<sup>146</sup> Creating disincentives for corporations considering what may already be risky investments will make it more difficult to bring states led by abusive and oppressive regimes into the fold of the global economy. It is perverse to staunch the flow of capital into the poorest of countries in the name of human rights, but this is exactly the sort of disincentive created by courts that

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144. A newspaper article reporting on the filing of a lawsuit will not likely provide much detail on the ATS or the way the Supreme Court has interpreted it. Bad publicity is generated the moment a corporate defendant is alleged to have been involved with human rights abuses, even though it may be that a foreign state actually committed the abuses and the corporation is far removed from the actual abuses. In addition, press coverage will initially be generated by the pleadings, not by findings of fact.

145. See, e.g., Celia W. Dugger, *In Zimbabwe Power-Sharing Talks, Who Will Get the Real Power?*, N.Y. TIMES, July 27, 2008, at A6 (discussing the economic isolation of Zimbabwe's oppressive president, Robert Mugabe).

146. "[The World Bank] provides low-interest loans, interest-free credits and grants to developing countries for a wide array of purposes that include investments in education, health, public administration, infrastructure, financial and private sector development, agriculture, and environmental and natural resource management." World Bank, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (last visited Feb. 25, 2010).

have engaged in the unprincipled expansion of bases of corporate liability under the ATS.

#### 4. Settlement Pressures

Another important practical consequence of corporate liability under the ATS is the competing interests corporations face when deciding how to proceed with litigation once an ATS suit has been filed. In order to succeed on an ATS claim, a plaintiff must plead that there has been a violation of the law of nations, and under the Supreme Court's decision in *Sosa*, this necessarily means that a plaintiff must allege that a corporate defendant has done something which is universally condemned.<sup>147</sup> This creates a strong incentive, if not a requirement, for plaintiffs to allege that a corporate defendant has committed the most egregious and heinous acts imaginable in order to survive a motion to dismiss for failure to state a claim. Once a plaintiff has survived a motion to dismiss, the corporation is left facing grave accusations, whether or not the plaintiff will ultimately be able to prove his or her case. Obviously, the publicity generated by such accusations is not good for any corporation. This leaves the corporation with two options: settle the claim, regardless of whether such conduct has actually occurred, or proceed with litigation and continue enduring the negative publicity. From a public relations standpoint, settling a claim has the likelihood of creating the impression that the defendant is in fact culpable and is settling to avoid the probable outcome of a trial. On the other hand, failing to settle a claim and going to trial will increase the duration of negative publicity.

#### D. *The Broader Economic Consequences of ATS Expansions*

In *re* South African Apartheid Litigation, a case decided by the Southern District of New York in 2009, provides an example of some of the larger problems created by corporate liability under the ATS.<sup>148</sup> In that case, which involved claims by South African residents that several large U.S. corporations aided and abetted South Africa's apartheid government, both the current South African government and the George W. Bush administration suggested that allowing the case to move forward could seriously compromise relations between the U.S. and South Africa.<sup>149</sup> Despite the aforementioned considera-

147. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

148. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

149. The United States filed a statement of interest with the Southern District of New York in 2003, stating that "continued adjudication of these suits risks potentially serious adverse consequences for significant interests of the United States." The South African government also filed

tions, which, given the Supreme Court's *Sosa*<sup>150</sup> admonishment to consider the potential implications for U.S. foreign relations and foreign policy before extending the ATS to encompass new causes of action should have resulted in dismissal of the claims, there were also implications for the U.S. economy.<sup>151</sup>

Among firms receiving financial bailouts from the Federal Government in 2008, General Motors ("GM"), one of the defendants in *In re South African Apartheid Litigation*, was among the largest recipients, with estimates of total federal funds received at approximately \$49.9 billion.<sup>152</sup> Obviously, all federal funds expended have at a minimum an indirect impact on the American public. When a corporation takes funding from the federal government, the federal deficit increases and Congress' ability to fund other programs is, at least in theory, diminished. To some extent then, the burden of apartheid-related litigation, from which the South African government is statutorily immune,<sup>153</sup> has now fallen on the American public through GM's alleged aiding and abetting of the South African apartheid government. It seems implausible, especially given the input of the Bush administration and the South African government, that either the Second Circuit or the District Court for the Southern District of New York were approaching the case with the judicial caution required by *Sosa*.<sup>154</sup> Surely, if the source or content of customary international law is as unclear as would appear from the differing viewpoints of the judges involved in deciding the case, a thoughtful consideration of the impacts of such litigation would tilt the balance squarely in favor of dismissal. Furthermore, considering that the Canadian and German governments

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a statement with the district court: "In the South African government's view, the issues raised in these proceedings are essentially political in nature. They should be and are being resolved through South Africa's own democratic processes . . . ." Brief for the United States as Amicus Curiae Supporting Appellees, *In re S. African Apartheid Litig.* (No. 09-2778-cv).

150. *Sosa*, 542 U.S. at 728.

151. See Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

152. CNNMoney.com, <http://money.cnn.com/news/storiesupplement/economy/bailouttracker/index.html> (last visited Mar. 18, 2010).

153. See Anthony Lewis, *At Home Abroad: Truth and Healing*, N.Y. TIMES, Jan. 16, 1995, at A17 for a description of South Africa's Truth and Reconciliation Committee, which grants civil and criminal immunity to officials of the apartheid government in exchange for testimony about the acts they committed.

154. *Sosa*, 542 U.S. 692, 722-23 (2004). After the election of President Jacob Zuma in May 2009, the South African government changed course on its view of *In re South African Apartheid Litigation*, now favoring ATS litigation against U.S. corporate defendants. David Glovin & Mike Cohen, *South Africa Backs GM, Ford, IBM Apartheid Lawsuit*, BLOOMBERG, Sep. 3, 2009, [http://www.bloomberg.com/apps/news?pid=20601116&sid=a2xm\\_iMWnc7g](http://www.bloomberg.com/apps/news?pid=20601116&sid=a2xm_iMWnc7g).



both contributed to the bailout of GM,<sup>155</sup> the decision to allow the litigation to continue has an indirect financial impact in both of those countries as well. Concededly, the decision as to whether to entertain jurisdiction in a non-ATS case does not typically involve consideration as to the financial impact to the defendant or third parties. These types of considerations, however, are exactly the type that courts are instructed to take into account given the Supreme Court's decision in *Sosa v. Alvarez-Machain*.<sup>156</sup>

For an example of the extent to which a suit such as *In re South African Apartheid Litigation* has consequences on U.S. citizens, one need look no further than the Supreme Court's inability to muster a quorum to vote on the defendant's petition for certiorari to the Court.<sup>157</sup> Although Supreme Court Justices do not typically provide reasons for recusal, three Justices held stock in at least one defendant company.<sup>158</sup> One Justice's son works for one of the defendant companies.<sup>159</sup> Through the use of retirement investment plans such as the 401k and the IRA, a large segment of the U.S. population has a financial interest in the profitability of U.S. corporations. It is simply unfair to punish the shareholders of the defendant corporations and the corporations themselves by transferring the liability for the atrocities of apartheid to them and away from the South African government through the use of the ATS.

In addition to what could be called the "direct" effects of corporate liability under the ATS, the possibility for foreign backlash against U.S. corporations is another factor that should be considered by courts deciding ATS cases. Clearly, under the ATS, district courts have jurisdiction over suits by aliens for violations of the law of nations.<sup>160</sup> Nothing in the language or the history of the statute would indicate that corporations domiciled outside of the U.S. are immune to ATS suits.<sup>161</sup> The notable difference, however, is whether a federal court has personal jurisdiction over a given foreign corporation. It is in this way that U.S.-based corporations are disproportionately disad-

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155. See, e.g., Paul Ingrassia, *How GM Lost Its Way*, WALL ST. J., June 2, 2009, at A21 (noting that with the inclusion of funds received by the Canadian and German governments, the total received by GM approached \$100 billion).

156. *Sosa*, 542 U.S. at 733.

157. Jess Bravin & Mark H. Anderson, *Justices Lack Quorum on Apartheid Suit*, WALL ST. J., May 13, 2008, at A3 (Chief Justice Roberts and Justices Alito and Breyer hold stock in defendant companies. Justice Kennedy's son works for one of the defendant companies, Credit Suisse Group).

158. *Id.*

159. *Id.*

160. 28 U.S.C. § 1350 (2006).

161. *Id.*

vantaged. A foreign state soliciting business with out-of-state corporations may therefore have an incentive to avoid doing business with U.S.-based corporations. If business is transacted with a U.S. corporation, the financial incentive for plaintiffs to bring ATS litigation increases the likelihood that the foreign state, like the corporation, will be judged for its actions in U.S. federal courts.

### E. *The Future of Kiobel*

Following the Second Circuit's decision in *Kiobel*, the *Kiobel* plaintiffs filed a Motion for Rehearing and Rehearing En Banc in the Second Circuit. Both of those motions have been denied.<sup>162</sup> However, the importance of the decision outside the Second Circuit is already becoming clear, and it seems likely that Supreme Court review will ultimately be sought. In a September 30, 2010, decision, the District Court for the Southern District of Indiana (which sits in the Seventh Circuit) discussed and approved of *Kiobel*'s holding, although the plaintiffs' claims were dismissed on other grounds.<sup>163</sup> The *Kiobel* decision has also created a circuit split with the Eleventh Circuit, which stated in *Romero v. Drummond Co.*, that "[t]he text of the Alien Tort Statute provides no express exception for corporations . . . and the law of this Circuit is that [the ATS] grants jurisdiction from complaints of torture against corporate defendants."<sup>164</sup> Thus, there is reason to think that the Supreme Court may grant certiorari and hear the case.

## V. CONCLUSION

There are a number of possible solutions to the problems posed by the current state of uncertainty regarding ATS litigation. The difficulty in solving the problem has much to do with the fact that Congress has remained silent on the issue. Clearly, the most effective solution would be for Congress to amend the ATS by setting clear parameters as to what constitutes a violation of the law of nations, the parties that can be liable for violating the law of nations, and the scope of liability for violations of the law of nations. This would remove much of the uncertainty corporations face when doing business with foreign governments and when operating in foreign countries. Amending the ATS would also allow Congress to "shut the door" to

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162. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *reh'g en banc denied*, No. 06-4800-cv, 2010 U.S. App. LEXIS 27003, at \*1 (2d Cir. Sept. 17, 2010), *reh'g denied*, No. 06-4800-cv, 2011 U.S. App. LEXIS 2200, at \*1 (2d Cir. Feb. 4, 2011).

163. *Viera v. Eli Lilly & Co.*, No. 1:09-cv-0495-RLY-DML, 2010 U.S. Dist. LEXIS 103761, at \*6-7 (S.D. Ind. Sept. 30, 2010).

164. *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

expanding the bases of ATS liability by enumerating the specific offenses that would be actionable under the ATS. Whatever the end result of a Congressional amendment to the ATS might be, such an amendment would provide a degree of stability and certainty which would give corporations a clear picture of the risk of ATS litigation in their operations. It seems likely that corporations will exert increasing resources lobbying for such an amendment as long as uncertainty remains.

Another possibility is that the Supreme Court will grant certiorari in a future ATS case, potentially in the *Kiobel* case, and will take the opportunity to clarify its 2004 *Sosa* holding.<sup>165</sup> If such a case should arise, the Court should, at a minimum, give a clear statement as to the sources of law that should be relied upon in determining whether a given activity violates the law of nations. It should clarify the degree of international acceptance a source of law should have, set a standard for accessory liability, and address the question of corporate liability. This would give corporations a better idea of the risks posed by conducting business in countries with questionable human rights records. A better solution would be for the Court to either look to the original meaning of the ATS or to enumerate specific actions that are deemed to violate the law of nations. The argument against the latter option is that the law of nations is constantly developing and an enumeration of the specific acts which violate it would freeze the decision in time. True as that may be, that concern ought to give way to the uncertainty that abounds under *Sosa*.<sup>166</sup>

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165. *Sosa v. Alvarez-Machian*, 542 U.S. 692 (2004).

166. *Id.*